IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

C.R.No. 6689 of 2005 (O&M)
Date of Decision :16.3.2007

Ballarpur Industries Ltd.

...Petitioner

Versus

Transport Corporation of India

...Respondent

Coram: Hon'ble Mr. Justice Vinod K.Sharma

Present: Mr. R.S.Rai, Advocate with
Ms. Meenakshi Dogra, Advocate for the petitioner.

Mr. Maninder Arora, Advocate for the respondent.

Vinod K.Sharma, J. (Oral)

The present revision petition has been filed against the order dated 27.8.2005 passed by learned Additional Civil Judge (Senior Division), Jagadhri vide which the application moved by the petitioner under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act") has been rejected.

The reason for dismissal of the application by the trial Court was that the petitioner had appeared in the Court for the first time on 18.3.2004 and sought adjournment for filing of the written statement. On the request of the petitioner, the case was adjourned to 4.5.2004 for filing of the written statement. On the said date the petitioner moved an application under Section 8 of the 1996 Act for stay of the proceedings and for referring the matter to the Arbitral Tribunal, in view of the arbitration agreement entered into between the parties. The learned court below came to the conclusion that as the petitioner by seeking adjournment had submitted to the jurisdiction of the Court and therefore, it was not open to the Court to refer them to Arbitral Tribunal. It was further observed that the dispute

between the parties is relating to the year 2003 and as the petitioner herein had not taken any steps for referring the matter to the arbitration, therefore, it has to be presumed that the respondent was not ready and willing for referring the matter to the Arbitrator. The learned trial Court also took note of the fact that in the petition under Sections 433, 434 read with Section 439 of the Companies Act this Court was pleased to observe that the petitioner would be at liberty to establish its claim before the Civil Court and disputed claim was not a ground for winding up of the petitioner-company.

Learned counsel for the petitioner contends that the findings recorded by the trial Court cannot be sustained in view of the judgment of the Hon'ble Supreme Court in the case of **Kalpana Kothari (Smt) vs. Sudha Yadav (Smt) and others (2002) 1 SCC 203,** wherein it is held that the provisions of Section 8 of the 1996 Act are all comprehensive and are of a mandatory character. The Hon'ble Supreme Court in the said judgment has been pleased to lay down that there is no provision under the 1996 Act, which corresponds to Section 34 of the Arbitration Act, 1940 (for short "the 1940 Act"). The contention of the learned counsel for the petitioner therefore, is that under Section 8 of the 1996 Act it is open to the party to move an application before submitting his written statement on the substance of the dispute and merely seeking adjournment for filing of written statement would not debar him from moving such application, as was the case under Section 34 of the Arbitration Act, 1940.

There is force in the contention of the learned counsel for the petitioner. The learned trial Court was, therefore, wrong in rejecting the

application merely by observing that as the petitioner had sought adjournment to file the written statement, it was thus debarred from moving application under Section 8 of the 1996 Act for stay of further proceedings.

Learned counsel for the respondent, however, contends that in view of the law laid down in the case of **Ashish Gupta vs. IBP Co. Ltd. and Anr. AIR 2006 Delhi 57** the impugned order is required to be upheld as the petitioner acted with malafide intention in invoking the bank guarantee without complying with the principle of natural justice or giving notice. The said judgment cannot be applied to the facts of the present case as in the said case the Hon'ble Delhi High Court was exercising the jurisdiction under Article 226 of the Constitution of India which was available to the Court in spite of the Arbitration Clause being in existence between the parties to the case. However, the Civil Court was bound by Section 8 of the 1996 Act in view of the law laid down by the Hon'ble Supreme Court holding that the application of provisions of Section 8 of the 1996 Act is mandatory, to refer the parties to Arbitral Tribunal.

The learned Court was also wrong in dismissing the application on the ground that the objections filed by the respondent under Sections 433, 434 and 439 of the Companies Act were dismissed with liberty to the petitioner to avail his remedy before the Civil Court. The interpretation of that order is to be read that the petitioner had to avail the remedy in accordance with law and therefore, does not entitle the respondent to bypass the provisions of the 1996 Act once there was an arbitration clause.

For the reasons stated above, this revision petition is allowed and the impugned order is set aside. The application moved by the petitioner under Section 8 of the 1996 Act is allowed and the parties are referred to the Arbitral Tribunal in terms of the arbitration agreement.

March 16, 2007 **(Vinod K.Sharma)**
gsv **Judge**